In the Missouri Court of Appeals
Eastern District

COURT EN BANC

STATE OF MISSOURI,	)	No. ED89968-01
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	
	)	
TYRONE C. BATEMAN,	)	Honorable Joan L. Moriarty
	)	
Appellant.	)	Filed: September 1, 2009

Introduction

Tyrone Bateman (Bateman) appeals from the judgment entered by the Circuit Court of the City of St. Louis, following his conviction of first degree murder, in violation of Section 565.020, RSMo 2000[1], and armed criminal action, in violation of Section 571.015. Bateman was sentenced to a term of life imprisonment without the possibility of parole on the murder conviction and received a consecutive term of ten years of imprisonment on his conviction of armed criminal action. We affirm.

Background

The facts of this case are undisputed. Viewed in the light most favorable to the verdict, the following evidence was adduced at trial: Bateman and Miles Bateman (Victim) were cousins

[1] All further statutory references are to RSMo 2000, unless otherwise indicated.

who lived on the same street, but several houses apart. A few days before the shooting, Bateman and Victim went out together. When they returned home, no one answered the door at Victim's house. Victim then spent the night at Bateman's house. When Victim awoke the next morning, he discovered Bateman had borrowed his van and some money. Bateman later returned the van, but not the money. Bateman left a pair of shoes or boots in the van, which Victim kept until he could collect the missing money from Bateman.

A few days later, on March 21, 2005, Victim was repairing a flat tire in front of his house when Bateman drove up with a mutual friend to retrieve his shoes. When Victim refused to return the shoes until Bateman returned his money, the two began arguing. The arguing escalated into a physical confrontation. Bateman struck or grabbed Victim, who retaliated by striking Bateman in the head with the jack handle he was holding. Victim's blow caused Bateman's head to bleed profusely. The two continued to wrestle on the ground in front of the house until another family member broke up the fight. Bateman told Victim, "[W]hen you get up off me, I'm gonna hurt you real bad." Victim then went into his house.

Bateman returned to his car, put the car in reverse, and drove in reverse to his house down the street. Bateman went inside of his house and retrieved a shotgun. Shortly thereafter, Bateman returned to Victim's house, knocked down the front door, and shot Victim once in the area of his left chest.

After shooting Victim, Bateman got back into his car and drove away, exclaiming, "I got him. I got him." During a subsequent search of Bateman's home, the police recovered the shotgun and a shotgun shell consistent with the gun used to shoot Victim. Victim died three weeks later as a result of the injuries inflicted from the gunshot wound. A few weeks after

Victim's death, Bateman was apprehended at an apartment, partially hidden in a bedroom closet. Bateman aggressively resisted arrest and the police had to subdue him with a taser.

At trial, Bateman admitted he shot Victim, but argued he was not guilty of first-degree murder. Bateman argued he was only guilty of voluntary manslaughter. The jury weighed the evidence to the contrary and convicted Bateman of first-degree murder and armed criminal action.

Bateman appeals.

Points on Appeal

Bateman raises two points on appeal. First, Bateman challenges the sufficiency of the evidence to support the first-degree murder conviction. Bateman asserts that the State of Missouri (State) failed to prove beyond a reasonable doubt that he coolly reflected prior to shooting Victim.

Second, Bateman argues the trial court erred in overruling his objection to the State's peremptory strike of an African-American venireperson, B.T., in violation of Batson v. Kentucky, 476 U.S. 86 (1987).

Discussion

Point I - Sufficiency of the Evidence

In his first point on appeal, Bateman challenges the sufficiency of the evidence to sustain the first-degree murder conviction. Bateman argues the State failed to prove beyond a reasonable doubt that he coolly reflected prior to shooting Victim. Bateman believes the reasonable inference to be drawn from the evidence was that he was "acting out of the influence of a violent anger or passion," and therefore, his conviction should be overturned. We disagree.

Standard of Review

We limit our review of a challenge to the sufficiency of the evidence supporting a criminal conviction to a determination of whether sufficient evidence was presented from which a reasonable juror could find the defendant guilty beyond a reasonable doubt. State v. Grim, 854 S.W.2d 403, 405 (Mo. banc 1993). We consider the evidence and all reasonable inferences drawn therefrom in the light most favorable to the jury's verdict and disregard all contrary evidence and inferences. State v. Gonzales, 253 S.W.3d 86, 89 (Mo. App. E.D. 2008). While reasonable inferences may be drawn from direct and circumstantial evidence, "the inferences must be logical, reasonable and drawn from established fact." State v. Presberry, 128 S.W.3d 80, 90 (Mo. App. E.D. 2003).

"In considering the sufficiency of the evidence, there must be sufficient evidence of each element of the offense." State v. Jordan, 181 S.W.3d 588, 592 (Mo. App. E.D. 2005), quoting State v. Dixon, 70 S.W.3d 540, 544 (Mo. App. W.D. 2002). The State has the burden to prove each and every element of a criminal case beyond a reasonable doubt. State v. Barnes, 245 S.W.3d 885, 889 (Mo. App. E.D. 2008). If the State fails to produce sufficient evidence to sustain a conviction, we must reverse the trial court's judgment. See State v. Deadmon, 118 S.W.3d 625, 628 (Mo. App. S.D. 2003).

Analysis

Section 565.020.1 states that a person is guilty of murder in the first degree if he or she "knowingly causes the death of another person after deliberation upon the matter." Deliberation is defined as "cool reflection for any length of time no matter how brief." Section 565.002(3). Deliberation need only be momentary, so long as the State demonstrates "the defendant considered taking another's life in a deliberate state of mind." State v. Miller, 220 S.W.3d 862,

868 (Mo. App. W.D. 2007). Stated differently, "[a] deliberate act is a free act of the will done in furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful purpose and while not under the influence of violent passion suddenly aroused by some provocation." Id.

Bateman does not dispute that he shot Victim or that the gunshot wounds ultimately caused Victim's death. Rather, Bateman argues his actions demonstrate he was acting under the influence of a violent passion or anger. Specifically, Bateman points to the evidence that supports the fact that he was hurt and bleeding when he drove the car recklessly back to his house to get the shotgun. Bateman then quickly returned to Victim's home, kicked down the door, and shot Victim. Bateman contends this evidence can lead only to the reasonable inference that he was deeply impassioned and angry immediately before the shooting. We disagree.

It is clear from the record that the fight between Bateman and Victim stopped once a family member separated them and Victim went into his house. Rather than letting this conclude the confrontation, Bateman left Victim behind, drove to his home down the street, retrieved a shotgun, and returned to shoot Victim. We may infer deliberation from the fact that Bateman had the opportunity to terminate the attack after it began. See State v. Cole, 71 S.W.3d 163, 169 (Mo. banc 2002). Moreover, Bateman threatened Victim after they separated, telling Victim he was "gonna hurt [him] real bad." Bateman returned shortly thereafter with a shotgun. These facts further support a finding of deliberation. See Rhodes v. State, 157 S.W.3d 309, 313 (Mo. App. S.D. 2005) (finding that a time lapse between the threat and the shooting would have established a period of deliberation).

Thus, after examining the totality of the circumstances, we cannot say a reasonable jury could not have found that Bateman deliberated prior to shooting Victim. We find the State

carried its burden of proving beyond a reasonable doubt that Bateman coolly deliberated when he shot Victim after their earlier fight, leading to Victim's death several weeks later. Point I is denied.

Point II –Batson Challenge

In his second point on appeal, Bateman alleges the trial court erred in overruling his objection to the State's peremptory strike of venireperson B.T. Bateman argues the State's strike was motivated by race, thereby denying Bateman and B.T.'s right to equal protection under the law. In response to Bateman's Batson challenge, the State explained to the trial court that it struck venireperson B.T. out of concern that B.T. might have a "more lenient bend to his personal disposition or in criminal matters" after B.T. asked unprovoked questions about whether there were offenses to consider other than first-degree murder. Bateman contends that the State's proffered reason for striking B.T. was a pretext for discrimination as evidenced by the State's failure to strike a similarly situated white venireperson, B.B., who also asked questions regarding punishment options.[2] We disagree.

Standard of Review

This Court will reverse the trial court's determination on a Batson challenge only upon a showing of clear error. State v. Barnett, 980 S.W.2d 297, 302 (Mo. banc 1998); State v. Chambers, 234 S.W.3d 501, 514 (Mo. App. E.D. 2007). A finding is clearly erroneous when the

[2] After voir dire, the trial court stated on the record that it was allowing strikes for cause as to fifteen venirepersons to which both the State and the defense had agreed. The State then requested that the trial court strike five additional jurors for cause, all of which the trial court granted. Defense counsel did not request any additional strikes for cause. The trial court then confined the jury pool to twenty-four jurors and six alternates. The trial court allowed each side six peremptory strikes from the main panel and two from the alternates. The State exercised four of its six jury peremptory strikes on black members of the panel. Defense counsel challenged each under Batson. The trial court upheld one of those challenges, placing that juror on the final panel. The State then used its remaining peremptory strike on B.T., a black venireperson. The eventual jury, including the two alternates, had three black members.

reviewing court is left with the definite and firm conviction that a mistake has been made. State v. McFadden, 216 S.W.3d 673, 675 (Mo. banc 2007).

Analysis

"Under the Equal Protection Clause, a party may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race." State v. Hampton, 163 S.W.3d 903, 904 (Mo. banc 2005), quoting State v. Marlowe, 89 S.W.3d 464, 468 (Mo. banc 2002). Missouri courts employ a three-step process to resolve a Batson challenge. "First, the defendant must raise a Batson challenge with regard to one or more specific venirepersons struck by the [S]tate and identify the cognizable racial group to which the venireperson or persons belong." Id.; State v. Parker, 836 S.W.2d 930, 939 (Mo. banc 1992). Second, the party making the peremptory strike must articulate a race-neutral explanation for the strike. State v. Morton, 238 S.W.3d 732, 734 (Mo. App. E.D. 2007). An explanation "is deemed race-neutral unless a discriminatory intent is inherent in the prosecutor's explanation, even if it would result in a disproportionate removal of minority venirepersons." State v. Hopkins, 140 S.W.3d 143, 148 (Mo. App. E.D. 2004). In the third step, "the defendant must demonstrate that the [S]tate's proffered reasons were merely pretextual and that the strike was racially motivated." State v. Strong, 142 S.W.3d 702, 712 (Mo. banc 2004).

Our review of Bateman's second point on appeal focuses on the third step in the analysis of a Batson challenge. It is not disputed that Bateman properly asserted a Batson challenge by objecting to the State's peremptory strike of B.T. on the basis of his race, as required by the first step of a Batson analysis, or that the State offered a facially race-neutral explanation for striking B.T., thereby satisfying the second step of a Batson analysis. As required by the third step in the

Batson analysis, defense counsel argued to the trial court that the State's proffered reasons for striking B.T. were pretextual. This is where we begin our review.

In determining pretext, the trial court considers the totality of the circumstances, including the presence of similarly situated white jurors (a crucial factor), the degree of logical relevance between the proffered reason and the case, the prosecutor's credibility based on his demeanor or statements during voir dire and the trial court's prior experience with the prosecutor, and the demeanor of excluded venirepersons. Marlowe, 89 S.W.3d at 469-70. Because weighing the legitimacy of the State's explanation for a peremptory strike is by nature a subjective exercise, we place great reliance in the trial court's judgment. State v. Morrow, 968 S.W.2d 100, 114 (Mo. banc 1998). The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. State v. Clark, 280 S.W.3d 625, 631 (Mo. App. W.D. 2008). Because appellate judges cannot easily second-guess a trial judge's decision about likely motivation, appellate courts grant the trial courts considerable leeway in applying Batson. State v. Johnson, 220 S.W.3d 372, 382 (Mo. App. E.D. 2007).

The record before us reflects that the peremptory strike of B.T. stems from the following exchange after the State asked the venire panel if it could apply the law to the facts of the case based upon the trial court's instructions. In response to this inquiry, B.T. responded as follows:

> Venireman [B.T.]: Juror 217. I believe I can. But one question, when you say degree, what do you mean by that, First Degree, Second Degree?
>
> [The State]: That will be entailed in the instruction that the Court gives you that there are elements that go into making a homicide a Murder in the First Degree. There are certain requirements, certain things that need to be sustained before it's Murder in the First Degree or to make it Murder in the First Degree.
>
> Venireman [B.T.]: I mean, is that like more of a harsher sentence?

> [The State]: Murder in the First Degree is a higher charge, per se, than Murder in the Second Degree or even manslaughter. There's kind of a ranging of them. Murder in the First Degree in some instances carries the death penalty. It does not in this case. Any of those questions that you have as far as degrees go, the Court will give you an instruction on.
>
> Let me ask you this: If your personal belief is one thing but the Court's instructions is [sic] another, will you be able to follow the Court's instruction and apply it to the facts of the case?
>
> Venireman [B.T.]: Yes.

Based upon this testimony, the prosecutor articulated his explanation for striking B.T. as follows:

> Your Honor, I struck [B.T.] for the sole reason that each -- before I asked a question about following the Court's instructions and [alluding] as to different degrees of murder or homicide shortly after reading the charge, it was a Murder in the First Degree case, [B.T.] beat me to that question and asked if there are different degrees of murder charges and are there other things than First Degree to consider. And the reason I strike him . . . is because I take that initiative that he showed as, you know, maybe a sign that he has a more lenient bend to his personal disposition in this matter or in criminal matters.

On its face, the State appears to have proffered a race-neutral reason for striking B.T. In considering the State's reason for exercising its peremptory strike, we note that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. Purkett v. Elam, 514 U.S. 765, 769 (1995). Bateman premises his pretext argument on his belief that the State misstated venireperson B.T.'s statements with respect to the degrees of murder. At trial, defense counsel suggested that B.T.'s statements reflected nothing more than a misunderstanding on B.T.'s part stating, "I think his question was he did not understand that there were degrees and what does that mean." Further, upon hearing the State's proffered explanation that B.T. had a "more lenient bend to his personal disposition," defense counsel cited venireperson B.B. as a similarly situated white juror who inquired as to punishment and was not struck by the State. One of the factors used to determine whether pretext exists is

the presence of similarly situated white jurors who were not struck from the venire panel.[3] State v. Pointer, 215 S.W.3d 303, 306 (Mo. App. W.D. 2007). This factor is crucial to determining pretext, although not conclusive. Id. We address each of Bateman's arguments in succession.

A. B.T.'s Statements

Bateman argues that B.T.'s response to the State's inquiry merely reflects a lack of understanding by B.T. as to the nature of the offense of murder in the first degree as opposed to any other degrees of murder. Bateman posits that the State has mischaracterized the nature of B.T.'s response, which he contends cannot reasonably be construed to reflect a "lenient bend to criminal matters." From this position, Bateman contends that the State's reason for striking B.T. is a pretext for racial discrimination. We disagree.

In support of his argument, Bateman offers this Court nothing but his own characterization of B.T.'s words. While Bateman may have a basis for his characterization, we find no grounds to hold that the State could not reasonably construe those same words as reflecting a potential that venireperson B.T. might harbor a leniency regarding criminal matters. We note that B.T. did not limit his question to, "[W]hat do you mean by that, First Degree, Second Degree?" After receiving a response to this question from the State, B.T. further inquired, "I mean, is that like more of a harsher sentence?" The record provides us with B.T.'s actual words. We are not persuaded that it was illogical or otherwise unreasonable for the State

[3] To determine if pretext exists, this Court also considers additional non-exclusive factors including the State's explanation in light of the totality of the circumstances, the degree of logical relevance between the explanation and the case to be tried, the demeanor of the state and excluded venirepersons, the trial court's past experiences with the prosecutor, and objective factors bearing on the State's motive to discriminate on the basis of race. State v. Johnson, 2009 WL 1456341, *4 (Mo. banc 2009); State v. Edwards, 116 S.W.3d 511, 527 (Mo. banc 2003). Our focus on the presence of similarly situated white jurors is not intended to minimize other factors relating to credibility. See Edwards, 116 S.W.3d at 527 ("[N]ot all of these factors will apply, or be equally important, in any given case."). Although neither Bateman's argument nor the trial court's order include any discussion of factors relating to demeanor, we will consider such factors to the extent they may be relevant to our analysis.

to consider B.T.'s question as to the harshness of the sentence as a potential indicator of his willingness to consider lesser included offenses with less harsh punishments than first-degree murder. To the contrary, the State's stated rationale striking B.T. appears reasonable and logically relevant to the case in which the defense was predicated on obtaining a conviction on a lesser included offense. In evaluating a Batson challenge, the trial court's "chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case." McFadden, 216 S.W.3d at 676, quoting Parker, 836 S.W.2d at 939. Trial judges are vested with considerable discretion in determining the plausibility of the prosecutor's reasons for peremptory strikes and whether the prosecutor purposefully discriminated in exercising peremptory strikes. State v. Gray, 887 S.W.2d 369, 384 (Mo. banc 1994).

We find that the State cannot be said to have mischaracterized B.T.'s statements, and further find that the State's explanation for striking B.T. is plausible in light of the facts and circumstances of this case. Given this finding, we proceed to Bateman's second argument that the State's racial motivation for striking B.T. is exposed by its failure to strike a similarly situated white venireperson.

B. Jurors Were Not Similarly Situated

The record reveals that venireperson B.B., who is white, also raised questions during voir dire that would allow one reasonably to conclude that B.B. was interested in the possible ranges of punishment. Bateman suggests that B.B.'s questions regarding punishment demonstrate the same initiative the State cited as its reason for striking venireperson B.T., who is black, and supports the argument that the State's reason for striking B.T. was a pretext for racial discrimination. In determining pretext, the Court considers the totality of circumstances,

including the presence of similarly situated white jurors not struck, which is considered a crucial factor. Marlowe, 89 S.W.3d at 469-70. The Court may also consider the degree of logical relevance between the proffered reason and the case, the prosecutor's credibility, and the demeanor of excluded venirepersons. Id. Although the presence of similarly situated white jurors is crucially probative of pretext, it is not dispositive. Parker, 836 S.W.2d at 939.

In reviewing the record, we find that the substance of the questions asked by venirepersons B.T. and B.B., and not the fact that each of these venirepersons asked questions, is dispositive of this point on appeal. Having reviewed the transcripts of the voir dire, we cannot conclude that venirepersons B.T. and B.B. are similarly situated. Accordingly, we find that the State's failure to strike venireperson B.B. does not support Bateman's argument that the State's strike of venireperson B.T. was racially motivated.[4]

The record reveals that upon resuming voir dire on the second day of trial, the prosecutor asked, "[H]as anyone else had a chance to sleep on anything about what we talked about and have a response to anything we may have talked about yesterday or you re-thought as of last night or today?" B.B. responded:

> Yesterday we were talking. And I'm not talking about presumption of innocence here or anything like that. But the State is not asking for the death penalty or it's been ruled out completely. And I'm trying, in my mind, to justify why if we determine that there was guilt in this case that we wouldn't be allowed to consider all possible punishment. Not that we would necessarily go for that, but why would we eliminate some of the punishment possibilities from the deliberation?

[4] The prosecutor's failure to use all of his peremptory strikes against black venirepersons may be considered to show that the reason for a peremptory strike is not racially motivated. State v. Johnson, 207 S.W.3d 24, 37 (Mo. banc 2006). Here, the prosecutor struck at least two white venirepersons while leaving two black venirepersons on the panel after the State completed its strikes.

The prosecutor explained to B.B. that there were several factors and legal issues involved when deciding to seek the death penalty, and that the death penalty was not an option for punishment in this case.

We decline to find that venirepersons B.T. and B.B. were similarly situated. Unlike B.T.'s question, which we have found reasonably could have been viewed by the State as showing an inclination to lean toward the lesser offenses, B.B.'s question suggests a possible inclination toward imposing a harsher sentence, up to and including the death penalty. B.B.'s "initiative" did not suggest leniency toward the defense, but instead indicates the exact opposite. Bateman's peremptory strike to remove B.B. from the jury suggests that Bateman and the State viewed venireperson B.B. differently, and not similarly. While both venirepersons may have demonstrated personal initiative regarding the level of crime and punishment for the offenses, we find it reasonable for the State and the trial court to conclude that B.B.'s initiative would benefit the State in its effort to obtain the harshest conviction possible while B.T.'s initiative would more likely benefit Bateman's defense against a first-degree murder conviction. The facts before us do not support a conclusion that B.B. and B.T. were similarly situated.

In light of the totality of the facts and circumstances presented in this case, we do not find that the trial court improperly analyzed Bateman's Batson challenge or wrongfully relied upon any mischaracterizations of B.T.'s comments. The evidence supports a finding that the State's proffered reason for striking venireperson B.T. was not a pretext for racial discrimination, but was reasonably related to the State's legitimate desire to obtain a conviction for first-degree murder against a defense that was focused upon obtaining a conviction on a lesser offense. While the record contains little comment from the trial court that elaborates on its ruling, we do

not find this lack of detail a basis for reversing the trial court's ruling.[5] The trial court's failure to comment on the substance of the questions asked by the respective venirepersons does not necessarily imply that the trial court failed to properly consider the arguments made by counsel representing Bateman and the State, or engage in the required three-step Batson analysis. To the contrary, the trial court reasonably could have concluded that the questions asked by venirepersons B.T. and B.B. were of an obvious nature revealing each venireperson's possible bias, and warranted no further discussion in its ruling.[6] How another trial court might have ruled on Bateman's Batson challenge is not relevant to our disposition. Our decision depends upon whether we are left with the definite and firm conviction that a mistake has been made. McFadden, 216 S.W.3d at 675. We are not left with such an impression given the facts of this case, and find no clear error in the trial court's denial of Bateman's Batson challenge to the State's peremptory strike of venireperson B.T.

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[5] Bateman asserts the trial court did not engage in the third step of Batson, analyzing pretext, because it failed to consider whether venireperson B.T. actually said what the State claimed, and failed to consider the existence of similarly situated jurors of another race, citing to State v. McFadden, 191 S.W.3d 648, 651 (Mo. banc 2006). McFadden does not impose any obligation on the trial court to make any particular type of record or ruling of its Batson inquiry. Our primary consideration in examining a procedural Batson challenge is whether the defendant had a full and fair opportunity to set out his or her arguments and to make a complete record for review. Johnson, 207 S.W.3d at 39. Although limited in detail, the record is sufficiently complete to establish that Bateman was afforded a full and fair opportunity to make a record of his evidence and arguments to the trial court prior to the trial court making its ruling on Bateman's Batson challenge. The transcript shows Bateman expressly presented his argument of pretext with regard to venireperson B.T. prior to the trial court's ruling. Given these facts, we are not persuaded that the trial court omitted any step of the Batson process.

[6] Although the trial court does not expressly base its ruling on issues relating to demeanor and credibility, the trial court was present during voir dire and is able to assess the demeanor of both the prosecutor and venirepersons B.T. and B.B., something we cannot do. The trial court's ruling reflects its observations. Although the trial court does not mention demeanor or credibility in its ruling, we are unwilling to conclude that such absence reflects a lack of consideration by the trial court of the demeanor of the relevant actors

Conclusion

The judgment of the trial court is affirmed.

Kurt S. Odenwald, Judge

Kenneth M. Romines, Chief Judge, concurs
Kathianne Knaup Crane, Judge, concurs
Clifford H. Ahrens, Judge, concurs
Robert G. Dowd, Jr., Judge, concurs
Mary K. Hoff, Judge, concurs
Sherri B. Sullivan, Judge, concurs
Glenn A. Norton, Judge, concurs
Roy L. Richter, Judge, concurs

Patricia L. Cohen, Judge, concurs in opinion of J. Odenwald in separate opinion

George W. Draper III, Judge, dissents

Nannette A. Baker, Judge, concurs in dissent of J. Draper in separate opinion

Lawrence E. Mooney, Judge, not sitting

In the Missouri Court of Appeals
Eastern District

COURT EN BANC

STATE OF MISSOURI,	)	No. ED89968-01
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	)	the City of St. Louis
v.	)	Cause No. 22051-01429
	)	
TYRONE C. BATEMAN,	)	Honorable Joan L. Moriarty
	)	
Appellant.	)	Filed: September 1, 2009

CONCURRING OPINION

I concur in this close case but write separately to note that I share the dissent's concern that we not overlook the significance of the Supreme Court's admonition as expressed in Miller-El v. Dretke, that "[n]one of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one." 545 U.S. 231, 247 n.6 (2005).

Patricia L. Cohen, Judge

In the Missouri Court of Appeals
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DIVISION FIVE

STATE OF MISSOURI,	)	No. ED89968-01
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DISSENT

I respectfully dissent from the majority's opinion regarding its analysis of Tyrone Bateman's (hereinafter, "Bateman") Batson challenge.[1] I would vote to reverse the trial court's ruling with respect to Bateman's second point on appeal and grant him a new trial.

In his second point on appeal, Bateman alleges the trial court erred in overruling his objection to the State's peremptory strike of venireperson Benjamin Thompson (hereinafter, "Thompson"), an African-American male. Bateman believes the State's strike was motivated by race, and thereby denied Thompson's right to equal protection under the law. Bateman argues the State mischaracterized Thompson's response and

[1] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986).

there was a similarly situated Caucasian venireperson, Bob Brindell (hereinafter, "Brindell"), who was not struck by the State.

"Under the Equal Protection Clause, a party may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race." State v. Hampton, 163 S.W.3d 903, 904 (Mo. banc 2005)(*quoting* State v. Marlowe, 89 S.W.3d 464, 468 (Mo. banc 2002)). Missouri courts employ a three-step process to resolve a Batson challenge. "First, the defendant must raise a Batson challenge with regard to one or more specific venirepersons struck by the [S]tate and identify the cognizable racial group to which the venireperson or persons belong." Hampton, 163 S.W.3d at 904 (*quoting* Marlowe, 89 S.W.3d at 468; State v. Parker, 836 S.W.2d 930, 939 (Mo. banc 1992)). Second, the party making the peremptory strike must articulate a race-neutral explanation for the strike. State v. Morton, 238 S.W.3d 732, 734 (Mo. App. E.D. 2007). This explanation "is deemed race-neutral unless a discriminatory intent is inherent in the prosecutor's explanation, and if it would result in a disproportionate removal of minority venirepersons." State v. Hopkins, 140 S.W.3d 143, 148 (Mo. App. E.D. 2004). In the third step, "the defendant must demonstrate the [S]tate's proffered reasons were merely pretextual and that the strike was racially motivated." State v. Strong, 142 S.W.3d 702, 712 (Mo. banc 2004).

This Court will reverse the trial court's determination on a Batson challenge only upon a showing of clear error. State v. Chambers, 234 S.W.3d 501, 514 (Mo. App. E.D. 2007); State v. Barnett, 980 S.W.2d 297, 302 (Mo. banc 1998). A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. State v. McFadden, 216 S.W.3d 673, 675 (Mo. banc 2007).

Based upon my review of the record, I believe the evidence supports the finding that the trial court improperly analyzed Bateman's Batson challenge in that the State's proffered explanation was racially motivated and mischaracterized Thompson's statements. I agree with the majority's assertion that Bateman properly asserted a Batson challenge by objecting to the State's peremptory strike of Thompson as required by the first step of the Batson analysis. However, I diverge from the majority's analysis at this point.

With respect to the second step, the State offered a facially race-neutral explanation for striking Thompson. The record reflects the State asked the venire panel if it could apply the law to the facts of the case based upon the trial court's instructions, specifically asking:

> I want to know if, let's say if you have your own opinion as to what you think is Murder in the First Degree or some other, or Murder in the Second Degree, you may have your own beliefs as to what constitutes that. But what I want to know is, can you agree to follow the instructions that the Court gives you which may differ from your own?

After speaking to five venirepersons and upon direct confrontation by the prosecutor,[2] Thompson responded to the State's question as follows:

> Thompson: I believe I can. But one question, when you say degree, what do you mean by that, First Degree, Second Degree?
>
> [The State]: That will be entailed in the instruction that the Court gives you that there are elements that go into making a homicide a Murder in the First Degree. There are certain requirements, certain things that need to be sustained before it's Murder in the First Degree or to make it Murder in the Second Degree.
>
> Thompson: I mean, is that like more of a harsher sentence?

[2] The transcript reflects the prosecutor asked a lengthy and somewhat convoluted question and then indicated he would begin eliciting responses from the jurors seated in the first row. It can only be inferred Thompson either raised his hand in response to the question, or he was called upon by the prosecutor in the natural order of the seated panel.

> [The State]: Murder in the First Degree is a higher charge, per se, than Murder in the Second Degree or even manslaughter. There's kind of a ranging of them. Murder in the First Degree in some instances carries the death penalty. It does not in this case. Any of those questions that you have as far as degrees go, the Court will give you an instruction on.
>
> > Let me ask you this: If your personal belief is one thing but the Court's instructions is [sic] another, will you be able to follow the Court's instruction and apply it to the facts of the case?
>
> Thompson: Yes.

Based upon this testimony, the prosecutor later articulated his explanation for striking Thompson as follows:

> Your Honor, I struck Mr. Thompson for the sole reason that each -- before I asked a question about following the Court's instructions and eluding [*sic*] as to different degrees of murder or homicide shortly after reading the charge, it was a Murder in the First Degree case, Mr. Thompson beat me to that question and asked if there are different degrees of murder charges and there are other things than First Degree to consider. And the reason I strike him … is because I take that initiative that he showed as, you know, maybe a sign that he has a more lenient bend to his personal disposition in this matter or in criminal matters….

On its face, this appears to be a race-neutral reason for striking Thompson. However, defense counsel responded she believed the State's reasons were pretextual as required by the third step in the Batson analysis. Defense counsel asserted the State misstated what Thompson's statements were with respect to the degrees of murder, explaining, "I think his question was he did not understand that there were degrees and what does that mean." Clearly, defense counsel's characterization was accurate. Defense counsel also identified Brindell as a similarly situated Caucasian venireperson.

The record reveals upon resuming voir dire on the second day of trial, and before Thompson ever made his comments to the prosecutor, the prosecutor asked, "[H]as anyone else had a chance to sleep on anything about what we talked about and have a

response to anything we may have talked about yesterday or you re-thought as of last night or today?" Brindell declared:

> Yesterday we were talking. And I'm not talking about presumption of innocence here or anything like that. But the State is not asking for the death penalty or it's been ruled out completely. And I'm trying, in my mind, to justify why if we determine that there was guilt in this case that we wouldn't be allowed to consider all possible punishment. Not that we would necessarily go for that, but why would we eliminate some of the punishment possibilities from the deliberation?

The prosecutor explained to Brindell that there are several factors and legal issues that come into play when deciding to seek the death penalty, but it was not an option in this case. The prosecutor also informed the jury it would not impose any sentence in this particular case. Based upon the prosecutor's representations about the two venirepersons' testimony and after hearing defense counsel's argument, the trial court permitted the State to strike Thompson because it found the State's reasoning was racially neutral without further comment or discussion.

One of the four factors used to determine pretext is the presence of similarly situated white jurors who were not struck from the venire panel.[3] State v. Pointer, 215 S.W.3d 303, 306 (Mo. App. W.D. 2007). This factor is crucial to determining pretext, although not conclusive. Id. Moreover, when "evaluating a Batson challenge, the trial court's 'chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case.'" McFadden, 216 S.W.3d at 676 (*quoting* Parker, 836 S.W.2d at 939).

[3] The other three factors are: the degree of logical relevance between the proffered explanation and the case to be tried; the prosecutor's credibility based on his or her demeanor or statements during voir dire and the trial court's past experiences with that prosecutor; and the demeanor of the excluded venireperson. Pointer, 215 S.W.3d at 303. I believe we are constrained from analyzing these factors because the record is devoid of any discussion of these issues, particularly with respect to the prosecutor's credibility, the trial court's past experience with the prosecutor, and the excluded venireperson's demeanor. There is nothing in the record to demonstrate the trial judge, who is the one tasked with weighing credibility under Batson, was aware of the attorneys' reputations or had past experience with the attorneys.

It is clear from the record that the State mischaracterized Thompson's testimony when stating its alleged race-neutral reason. Despite the majority's assertion that Thompson's questions were "unprovoked," the record demonstrates Thompson was in fact responding to a direct question by the prosecutor and did not take "initiative" by asking about potentially harsher sentencing. Even if a tortured reading of the transcript leaves one with the impression Thompson's follow up question could be construed as "initiative," one could not help but surmise Brindell took "initiative" as well when he asked *sua sponte* about the range of punishment after being invited to do so by the prosecutor's open-ended question when voir dire resumed.

Additionally, when looking to the substance of the questions asked by the venirepersons as the majority suggests, nothing contained within Thompson's response or question demonstrated an apparent disposition toward leniency that would distinguish him from Brindell, other than his race. Brindell asked why the jury would not be able to consider all possible forms of punishment. Thompson asked, "[I]s that like more of a harsher sentence?" The majority faults Bateman for offering this Court "nothing but his own characterization of Thompson's words" in support of his argument. Yet, the majority takes pains to craft its own independent characterization of Thompson's response based upon a sparse record where the trial court did not attempt to clarify Thompson's comments or compare these comments to Brindell's statements. If the trial court required clarification with respect to the venirepersons' testimony, the trial court had the court reporter present, who could be consulted in quick order, lending accuracy to an otherwise imprecise practice.[4]

[4] Quick consultation is in no way unduly burdensome as the phrase, "Would you read that back?" has often been heard in courtrooms across the country.

On the face of the record we have before us, both venirepersons' asked questions about punishment, yet the majority finds they are not similarly situated. "A *per se* rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters." Miller-El v. Dretke, 545 U.S. 231, 247, 125 S. Ct. 2317, 2329 (2005).[5]

Moreover, when examining the handling of another strike made by the State, I am further persuaded and left with the definite and firm conviction that a mistake has been made in the point raised by Bateman. As the majority points out, the State exercised four of its six peremptory strikes against African-American venirepersons. Defense counsel challenged each strike, arguing they each constituted a Batson violation. The trial court upheld one of the challenges, placing that juror on the panel that heard the case. With respect to that challenge, when overruling the State's strike of an African-American female, the trial court spoke of the retention of a similarly situated African-American male who was not struck, as opposed to a similarly situated Caucasian venireperson. This comment demonstrates the trial court's misunderstanding of the Batson procedure was not confined to the issue raised on appeal.

In light of the totality of the facts and circumstances presented in this case, I believe the trial court improperly analyzed Bateman's Batson challenge and wrongfully relied upon the State's mischaracterizations of Thompson's comments. The trial court's ruling on the State's peremptory challenge was in clear error without more in the record

[5] This admonition seems to have been discounted given this Court's most recent holding with respect to the "similarly situated" aspect of the pretextual analysis under Batson. *See* State v. Collins, No. ED91542, 2009 WL 1444563 (Mo. App. E.D. 2009). When coupled with today's majority opinion, I find a troubling trend developing which will make it virtually impossible for a defendant to assert a successful Batson challenge based upon pretext and the presence of similarly situated Caucasian venirepersons given the propensity to find even the smallest distinction, or a distinction without a difference, sufficiently race-neutral to strike minorities from a jury and prevent them from performing their constitutionally guaranteed civic duties.

to support the venirepersons' alleged motivation in asking about sentencing and punishment during voir dire. The majority merely speculates about the possible motivations underlying the venirepersons' questions. I believe the venirepersons were similarly situated with nothing to distinguish them other than their race.

Finally, I must reiterate, that in cases such as this, an improper strike infringes upon the right of the venireperson to perform his or her civic duty of sitting on a jury. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991); Parker, 836 S.W.2d at 933. The proper remedy is "to quash the strikes and permit those members of the venire stricken for discriminatory reasons to sit on the jury if they otherwise would." State v. Grim, 854 S.W.2d 403, 416 (Mo. banc 1993). "This remedy vindicates the equal protection rights both of the accused and the stricken venireperson." Hampton, 163 S.W.3d at 905. "The survival of [the peremptory strike] procedure in a constitutionally permissible manner need be neither offensive nor unduly burdensome to our courts and lawyers. Whatever complications that may result are a small price to make citizen participation in our judicial process free from the taint of racial, gender-based, religious, or ethnic discrimination." Parker, 836 S.W.2d at 942 (Price, J., concurring).

Accordingly, I would reverse and remand for a new trial.

GEORGE W. DRAPER III
Judge

In the Missouri Court of Appeals
Eastern District
COURT EN BANC

STATE OF MISSOURI,	)	No. ED89968-01
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	
	)	
TYRONE C. BATEMAN,	)	Honorable Joan L. Moriarty
	)	
Appellant.	)	Filed: September 1, 2009

DISSENT

I join in the dissent, but I write separately because I believe the trial court clearly erred in its analysis of the third step in the *Batson* inquiry. See *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992) (At the third step, "[t]he chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case. Any facts or circumstances that detract from or lend credence to the prosecutor's proffered explanations are, therefore, relevant" (citation omitted)). There are additional facts that should be considered in this case. One highly relevant fact is that the State did not originally strike Thompson. He was not stricken until a *Batson* challenge to another African-American venireperson, Juror 673, was sustained. The prosecutor's belief that Thompson may have a more lenient bend because he took initiative in asking about degrees of murder was apparently not a concern until

the State was unsuccessful in attempting to strike a different African-American venireperson from the jury. The trial court was aware of this, but did not make any credibility findings when it ruled on the *Batson* challenge. These circumstances detract credibility from the prosecutor's proffered race-neutral explanation and lead to the conclusion that the State's proffered reason for the strike is merely pretextual and the strike was racially motivated.

Additionally, upon my review of the record, I find that the prosecutor's explanation falsely represents Thompson's statements during voir dire. Thompson did not "beat" him to a question about the different degrees of murder, and his question did not come "before" the State asked the venire panel if they could follow the court's instructions regarding the different degrees of murder. Thompson's question was provoked by the Prosecutor's question on precisely this issue. This timing distinction is crucial in determining pretext because the State relies on these facts to show Thompson's "initiative." As these facts are incorrect, the State's race neutral explanation fails. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Kesler-Ferguson v. Hy-Vee, Inc.,* 271 S.W.3d 556, 559 (Mo. banc 2008) (citing *Purkett v. Elem*, 514 U.S. 765, 768 (1995)). The totality of the circumstances leads me to believe that a mistake has been made.

Finally, I'd like to note the justification behind *Batson*, which the Missouri Supreme Court enunciated in *State v. Parker*, 836 S.W.2d 930 (Mo. banc 1992). Prior to *Batson*, a defendant had to show that "the prosecutor consistently and systematically struck African-Americans from the venire in case after case regardless of the circumstance, with the result that no African-Americans ever served on petit juries."

Parker, 836 S.W.2d at 933. "In *Batson* the United States Supreme Court recognized that *the crippling burden of proof* imposed upon defendants" to prove a violation of equal protection rights from the encroachment by prosecutors exercising peremptory challenges "nearly immunized a prosecutor's use of peremptory challenges from constitutional scrutiny." *Id.* (emphasis added).

In the context of *Batson* challenges based on the presence of similarly situated Caucasians who were not struck by the prosecution, the protection of *Batson* and its lowered burden of proof is being eroded by a developing trend to justify the striking of minorities by pointing to insignificant and miniscule distinctions between the minority and the Caucasian venireperson.

Nannette A. Baker, Judge